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December 5, 2000

Via hand delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

EX PARTE OR LATE FILED

Re: CC Docket No. 00-176

Dear Ms. Salas:

The attached letter to Charman Kennard is being delivered today, and should be made a part of the record in the above-referenced proceeding.

Very truly yours,

Florence Grasso

Florence M. Grasso

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Dhruv Khanna
Executive Vice President and General Counsel

5 December 2000

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 00-176

Dear Chairman Kennard:

In a letter to you dated December 1, 2000, Verizon urges the Commission to approve the pending Massachusetts section 271 application because "there is no serious dispute that Verizon satisfies at least 13 and one-half points of the 14 point checklist."[1] This statement is an exaggeration on its face, for even as to DSL issues, there are three principal areas of Verizon noncompliance with the competitive checklist that Covad has alleged. As to stand-alone DSL loops, linesharing UNEs, and OSS, as detailed in this response to Verizon's letter, Verizon is not in compliance with the section 271 checklist in Massachusetts. Covad appreciates and respects the attention you have focused on section 271 applications, and in particular your refusal to "lower the bar" on the level of DSL proof required of applicants. Covad respectfully submits that if the Commission were to grant the instant application, based on the evidence before it, that bar would be lowered beyond a point that could sustain competition in the DSL sector.

Verizon opens its letter to you by arguing that the Commission must "put the issue in context" rather than focus closely on DSL issues, suggesting that "DSL loops are a minority of the unbundled loops . . . in Massachusetts, and a minority of the unbundled loops that are being added on a monthly basis."[2] Verizon suggests that the Commission should recognize "the limited scope of the debate" and conclude that DSL issues are not important enough to derail Verizon's efforts to enter the long distance market in Massachusetts.[3] This is bold rhetoric[4], given that (a) it is factually wrong[5], and (b) this

[1] Letter dated December 1, 2000, from Edward D. Young III, Senior Vice President, Federal Government Relations, to William E. Kennard, Chairman, Federal Communications Commission (Young Letter), at 1.
[2] *Id.*
[3] *Id.*

Commission has repeatedly and consistently recognized its "statutory obligation to encourage deployment of advanced services and the critical importance of the provisioning of xDSL loops to the development of the advanced services marketplace."[6] As a result, the Commission has instructed Verizon and all other BOC section 271 applicants to make a "separate and comprehensive evidentiary showing with respect to the provision of xDSL-capable loops."[7]

Verizon also argues in its letter that its "separate data affiliate is now fully operational in Massachusetts, well ahead of the schedule that it is required to be."[8] This is the first time Verizon has made this argument. Nowhere in its application or in reply comments did Verizon rely on its separate affiliate to demonstrate DSL compliance, and its efforts to do so at this late date are unwarranted, untested, and unverified. Covad cannot refute this argument because it has seen no evidence whatsoever of Verizon's separate affiliate in Massachusetts. Thus, Verizon is and must be forced to rely on the performance data it has submitted for Massachusetts. That data demonstrates conclusively that Verizon is discriminating against competitive DSL providers in Massachusetts.

Given the record in this proceeding, Verizon may be tempted to withdraw the instant application, fix its numbers, and resubmit it a short time later. Covad respectfully suggests that this is no more beneficial to competition than if the Commission were to approve the application now. The Commission must become actively involved in overseeing Verizon's compliance with the checklist: as detailed below, the Commission must provide Verizon specific instructions to fix its performance, not just its numbers. Only by assuring Verizon's full compliance with the UNE loop, linesharing, and OSS

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[4] For example, Verizon makes much of an out-of-context statement regarding Verizon's performance by Covad's former CEO to Wall Street analysts at the end of a CLEC-debilitating Verizon strike. Young Letter at 1-2, 5. Fortunately, the Commission, not the investment community, weighs the evidence of Verizon's compliance with its checklist obligations.

[5] In order to support its argument that xDSL loops are a small percentage of the overall UNE loop volume, Verizon has lumped together DSL loops, other UNE loops, and so-called UNE-platform loops. UNE-P loops are, of course, not really UNE loops – in order to provision such "loops," Verizon simply makes a change in its billing software. This is exactly why the Commission separates the BOC's UNE-P evidence from xDSL loop evidence – because providing xDSL loops requires actual loop provisioning, not software changes, and proof of UNE-P provisioning does absolutely nothing to demonstrate stand-alone loop performance. So what are the real numbers? In Verizon's Gertner/Bamberger Reply Declaration, Verizon notes that it received 2,694 DSL loop orders for the month of July 2000. Verizon Gertner/Bamberger Reply Declaration at para. 22 n. 13. In an *ex parte* letter submitted to the Commission on November 17, 2000, Verizon contends that it provided 2,411 non-DSL stand-alone loops for the month of July 2000. *See* Letter dated November 17, 2000, from Dolores A. May, Executive Director, Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, FCC, at 2. Thus, Verizon's own data shows that, for July 2000 (the last evidentiary period that should be examined, according to Verizon, because of its "strike-affected data" from August 2000 forward), DSL loops make up at least 53% (2,694) of the total stand-alone loops (5105) provided by Verizon for that period. In addition, Covad and other DSL providers order ISDN loops from Verizon in order to provision certain DSL services, such as IDSL, and Verizon does not include such loops in its "DSL loops" count – so the actual DSL loop percentage is even higher.

[6] *Bell Atlantic New York Section 271 Order* at para. 330.

[7] *Id.*

[8] Young Letter at 9.

obligations that Verizon has not yet fulfilled will the Commission preserve competition in the DSL sector that is eroding further every day.

The legal conclusions of the Department of Justice, not those of Verizon or the Massachusetts DTE, are statutorily entitled to "substantial weight."

Verizon contends that the conclusion of the Massachusetts DTE that Verizon is giving CLECs "the service they request" is all the information this Commission needs to approve Verizon's application.[9] Yet the DTE's comments contending that Verizon has satisfied the competitive checklist are due no more deference than Covad's comments. Only one legal evaluation is statutorily afforded "substantial weight": that of the Department of Justice. And in the DOJ's view, the Massachusetts DTE did not do its job in this proceeding.[10] "The Department has concluded that Verizon has not yet demonstrated (1) that it provides nondiscriminatory access to DSL loops, and (2) that suitable performance measures with unambiguous benchmarks are in place to deter backsliding. The Commission should not approve this application without such a demonstration."[11] The DOJ also highlighted the danger to competition that would result if the Commission lowered the bar for long distance entry by relying on Verizon's excuses. "To the extent that the Massachusetts performance measures do not accurately indicate whether Verizon is providing discriminatory or nondiscriminatory access to DSL loops, those deficiencies in the performance measures will substantially increase the

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[9] Young Letter at 1.

[10] *See, e.g.* DOJ Evaluation at 8 n.30 ("The MA DTE submitted a detailed evaluation of Verizon's DSL performance concluding that Verizon provides nondiscriminatory access. On several issues, however, the basis for that conclusion is not clear from the MA DTE's submission. For example, is it unclear to what extent the MA DTE based its conclusions about Verizon's DSL installation timeliness and maintenance and repair performance on Verizon's studies of POTS lines. See MA DTE Evaluation at 298-99, 320. It is also unclear whether the MA DTE's conclusion about the adequacy of Verizon's missed installation appointments and maintenance and repair performance relied on newly implemented, but as yet unproven, process improvements including the enhanced capability of Verizon's mechanized database, new cooperative testing procedures, and recently ordered (but not yet tariffed) substitutes for copper facilities. See MA DTE Evaluation at 309-10, 315. In addition, the Department does not know whether the MA DTE's conclusions on Verizon's missed installation appointments performance were based, in part, on the misconception that Verizon retail does not provide the largest share of DSL loops in Massachusetts. See MA DTE Evaluation at 307 n.965. Further, the Department is uncertain how much weight the MA DTE gave to its finding that CLECs did not respond to Verizon's August 2000 assertions that CLECs were accepting non-working loops when it appears that the remaining opportunity for comment may have been limited to oral argument and that CLECs have disputed Verizon's assertion in their initial comments to this Commission. See MA DTE Evaluation at 312; Rhythms Comments at 32-33; Covad Comments at 51-52. The Department is also uncertain whether the MA DTE concluded that CLEC practices had distorted Verizon's current performance data (for loop installations and maintenance and repair) solely on the basis of CLEC statements in December 1999 (before the DSL joint testing procedures were fully implemented), or whether there is more recent evidence of those CLEC practices. See MA DTE Evaluation at 313-14, 320. Finally, it is unclear how the MA DTE will be able to effectively monitor Verizon's future performance on missed installation appointments without having an established measurement method in place. See MA DTE Evaluation at 307-08.").

[11] DOJ Evaluation at 2-3.

difficulties of detecting and providing remedies for any discriminatory performance that may arise in the future."[12]

Verizon's own performance metrics demonstrate that Verizon discriminates against competitors.

In its December 1, 2000, letter to you, Verizon claims that it "installs unbundled DSL loops on time."[13] This is not true. The evidence that Verizon does not install UNE DSL loops on time comes from Verizon's own data. Massachusetts performance measure PR 3-10, which measures the percentage of time that Verizon provisions DSL loops within the six-day interval to which Verizon is bound in Massachusetts, demonstrates that for July 2000, Verizon delivered DSL loops on time only 51% of the time. This performance metric, agreed to by Verizon, competing carriers, and the New York PSC in a collaborative process, excludes all possible CLEC and customer-caused reasons for delay (as characterized by Verizon itself), and thus provides a "best case" measure of Verizon's on-time performance. Clearly, 51% on-time performance does not give Covad and other DSL providers a meaningful opportunity to compete.

Verizon has come up with an excuse for this poor performance, and it has detailed that excuse in its letter to you. Specifically, Verizon contends that the measure is "fundamentally flawed" because it measures non-prequalified loops, which are entitled to a nine-day interval, as well as orders with facilities issues and orders where carriers requested longer than the standard interval.[14] Yet these excuses are brand new, and they are untested, unvalidated, and unverified. This is not just Covad's view of Verizon's excuses: the Department of Justice rejected them as well. "The Department has not been able to determine whether Verizon's objections to the performance measures are valid or whether Verizon is providing nondiscriminatory performance even under its suggested alternative methods of measuring performance. We believe, however, that it is appropriate to insist that Verizon satisfy its burden of proof on these issues."[15]

Verizon has not provided any data to support its contention that CLECs are requesting longer intervals[16] or that facilities issues[17] are skewing the performance results. Verizon did attempt to quantify its biggest excuse for poor loop performance – that manual loop qualification requests are included in Verizon's PR 3-10 metric, skewing the performance data with loops that are entitled to a nine-day, rather than six-day, interval. When Verizon's own experts excluded manually qualified loop requests from the July 2000 metric, they conclude that Verizon's on-time performance for PR 3-

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[12] *Id.* at 14. Even more crucial, as the Department concluded, Verizon decided to file its application before linesharing metrics were in place, so the Commission has no reliable measure of Verizon's linesharing performance. *Id.* at 16.

[13] Young Letter at 3.

[14] *Id.* at 5.

[15] DOJ Evaluation at 13.

[16] Covad would rarely, if ever, have any reason to do so.

[17] For July 2000, Verizon reports via PR 5-01 that it missed 2.88% of DSL installation appointments due to facilities issues, suggesting that its overall loop provisioning performance could not have been significantly affected by this excuse.

10 is 62.40%, rather than 51.45%.[18] This result, still woefully short of Verizon's 83% performance for its retail customers, suggests that the manual qualification excuse is not the panacea for excusing poor performance that Verizon thought it would be.[19]

Why is Verizon offering you unsubstantiated new excuses for its poor performance, rather than supporting those excuses with factual evidence on the record? Importantly, the Massachusetts DTE permitted Verizon to avoid any independent third-party testing of its DSL performance. Indeed, the DTE noted in its comments that "KPMG did not replicate VZ-MA's xDSL metrics on a disaggregated basis."[20] As the Department of Justice concluded, "[a]lthough KPMG reviewed other Verizon performance metrics, it did not test the DSL metrics because they were implemented by Verizon after the initial testing period."[21] The Department thus concluded, "it is difficult or impossible to verify Verizon's reformulated performance calculations and analysis because Verizon has not provided the data underlying its reformulated performance calculations and because Verizon has not given the CLECs their individual performance reports, which would be necessary to permit CLECs to verify or refute Verizon's restated performance."[22] The Commission must, as the Department suggested, reject Verizon's late-developed excuses and attempts to escape the truth of the performance metrics. Verizon's performance in Massachusetts is discriminatory against DSL competitors. The Commission cannot and should not approve a Verizon section 271 application for Massachusetts until Verizon has improved its performance, not simply explained away its numbers.

In the *Bell Atlantic New York 271 Order*, the Commission stated that it would "examine carefully" the state-adopted performance standards measuring the average provisioning interval, the number of missed installation appointments, and the applicant's maintenance and repair functions in future applications.[23] Indeed, in upholding the Commission's decision in the *New York 271 Order* to approve Bell Atlantic's application without requiring proof on DSL issues, the D.C. Circuit Court stated, "[w]e . . . expect, as did the FCC, that as DSL-capable loops become a larger proportion of unbundled loops, and as performance standards are developed, checklist compliance will require a separate and comprehensive evidentiary showing with respect to the provision of DSL-capable loops."[24] PR 3-10 is the performance metric that Verizon agreed to in order to show whether it provided DSL loops on time. The Commission cannot simply ignore the poor results of that metric.

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[18] Verizon Gertner/Bamberger Reply Declaration at para. 23.

[19] Verizon's recalculated 62.4% performance is especially inadequate when one considers that even 83% performance might not provide a meaningful opportunity to new entrants marketing a new service burdened by the growing public appreciation of how difficult the whole process has been made by Verizon's intransigence.

[20] DTE Reply Comments at 22.

[21] DOJ Evaluation at 15, citing to Rhythms Comments at 29-30 (quoting KPMG statements at DTE Technical Conference (". . . we did not test the xDSL metrics....")).

[22] DOJ Evaluation at 11.

[23] See *Bell Atlantic New York 271 Order* at paras. 316, 333, 335. The Commission made the same conclusion in the SWBT Texas 271 Order. *See id.* at para. 282.

[24] *AT&T Corp. v. FCC*, 220 F.3d 607, 624 (D.C. Cir. 2000) (quoting *Bell Atlantic New York 271 Order* at para. 330).

In an effort to distract from its true performance, Verizon offers in its letter to you several red herring arguments about 92 percent or 95 percent on-time performance.[25] For example, Verizon claims that the "on-time measurements adopted by the DTE for use in the Performance Assurance Plan (PAP) show that Verizon installs more than 95 percent of new DSL loops on time under normal operating conditions."[26] How is this possible in light of the far lower on-time figures generated by Verizon's own performance measures, as discussed above? It is because, as detailed below, the PAP metric, as defined, eliminates from consideration a large portion of the loops that Verizon delivers late. [27]

The DSL metric in the PAP that Verizon claims shows "95 percent" on-time performance is a self-fulfilling performance measure. Specifically, the business rules for the PAP DSL metrics permit Verizon to exclude loop orders "that are not complete" from its metrics. Thus, Verizon is essentially reporting on the on-time performance for loops it completed on time, and excluding any loops it did not complete from that measure.[28] The same is true for the other claims that Verizon makes in its letter to you. This is why, for example, Verizon's claim of 92 percent on-time performance pursuant to the carrier-to-carrier metrics is similarly not true. Verizon is once again eliminating all loops that it did not complete. And there is proof that this skews the metric: despite the fact that Verizon notes elsewhere in its application that there were 2,694 DSL loops to be delivered in July[29], Verizon counts only 620 loops in measuring its performance pursuant to the metrics it cites in its December 1 letter. It is therefore easy to understand how Verizon can claim better than 95 percent on-time performance, when the real data in PR 3-10 shows that it only completed 51% of DSL loops on time: Verizon simply excluded from the measure any loops it did not complete.[30] The Commission should not permit Verizon to claim 95 percent on-time performance when it is only reporting to the Commission on 620 of those 2,694 loops.

Finally, Verizon addressed the strike period by claiming that it "went to great lengths to provide our carrier-customers with better service during the recovery period

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[25] Young Letter at 3-5.

[26] Young Letter at 3.

[27] It should also be noted that the majority of the DSL metrics in use in Massachusetts are not included in the PAP. Indeed, there are only two DSL provisioning metrics included in the PAP. This is why the Department of Justice (and later the Massachusetts DTE itself) concluded that the PAP must be changed. As the DTE found, "the Massachusetts PAP should be strengthened with respect to DSL services." *See Investigation by the Department of Telecommunications and Energy upon its own motion pursuant to Section 271 of the Telecommunications Act of 1996 into the Compliance Filing of Verizon New England Inc. d/b/a Verizon Massachusetts as part of its application to the Federal Communications Commission for entry into the in-region interLATA (long distance) telephone market, Order on Motions for Clarification and Reconsideration,* DTE 99-217, Nov. 21, 2000, at 6.

[28] The same is true of the missed appointment metric, PR 4-04.

[29] *See* Verizon Gertner/Bamberger Reply Declaration at para. 22 n. 13.

[30] Verizon takes one parting shot at the PR 3-10 metric, claiming that it unfairly compares its retail second line POTS provisioning with its DSL loop provisioning. This is the retail comparison that Verizon itself proposed before the New York PSC, so it is hard to justify Verizon's decision to critique it now that it shows poor performance.

than we provided retail customers."[31] Again, Verizon's claims are belied by Verizon's own data. For August 2000, Verizon provided DSL loops on time only 40 percent of the time, whereas it provided its retail customers with on-time service more than 62 percent of the time.[32]

Verizon's performance on maintenance and repair of DSL loops is discriminatory.

Verizon concedes in its letter to you that the measure of loop quality that the Commission has traditionally relied on in section 271 proceedings – trouble tickets submitted within 30 days – shows "a difference between wholesale and retail."[33] As to trouble tickets submitted within 30 days, it is interesting to note that Verizon's own "expert" affiants reject Verizon's excuse for the large number of trouble tickets. Verizon contends in its letter to you that Covad is accepting loops as good and then opening trouble tickets on them when the loops do not work for the particular "flavor" of DSL that Covad wishes to offer.[34] In its examination of trouble reports, Verizon's experts conclude that "for such records, a trouble report within 30 days of installation likely indicates that the DSL line never was operational (i.e., it is unlikely that the line worked when installed, but developed trouble within the next 30 days)."[35] This is exactly what Covad has contended throughout this proceeding: the loops that Verizon provides Covad are simply non-working loops – they would not work for voice, and they would not work for data. As Verizon's Covad-specific data for July demonstrates, over three times as many Covad loops as Verizon loops – 9.33% of Covad loops, versus 2.97% for Verizon – result in trouble tickets within 30 days. Verizon has its own solution: in its letter to you it decides to "exclud[e] those loops that experience problems that clearly should have been revealed during acceptance testing procedures."[36] As a result of excluding all those loops, Verizon concludes that its unilateral modification to the performance metric shows rates "virtually identical for wholesale and retail orders."[37] As Covad has argued in this proceeding,[38] the fact that acceptance testing does not reveal a loop problem is much more likely Verizon's fault than Covad's. Regardless of whose fault it may be, the fact remains that a large percentage of those loops that Verizon claims to have delivered to Covad are, pursuant to Verizon's own data, simply non-working loops.

Verizon reports its loop repair record – mean time to repair – by means of MR 4-02. For July 2000, that report demonstrates that Covad customers wait an average of a full day longer for their service to be repaired than Verizon's own retail customers. Once again, Verizon offers you excuses for its poor performance. First, Verizon contends that "CLECs inability to identify the source of the trouble" causes delay time.[39] It is unclear

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[31] Young Letter at 4.
[32] PR 3-10 for August 2000.
[33] Young Letter at 6.
[34] *Id.*
[35] Verizon Gertner/Bamberger Reply Declaration at para. 10.
[36] Young Letter at 7.
[37] *Id.*
[38] *See* Letter dated Nov. 1, 2000, from Jason Oxman, Senior Government Affairs Counsel, Covad Communications Company, to Magalie Roman Salas, Secretary, FCC, at 1-2.
[39] Young Letter at 8.

how it is Covad's responsibility to determine the source of the trouble, when it is Verizon's responsibility to investigate the trouble report and repair the loop. If no trouble is found on the loop, Verizon excludes that trouble ticket from MR 4-02 and is not penalized for that trouble report in reporting its performance. Verizon also contends – erroneously – that Covad rejects weekend repair appointments, which it does not.[40] In the absence of excuses, Verizon's own data clearly demonstrates that it discriminates against Covad in repairing loop trouble reports.

Pre-order OSS loop qualification database access

Verizon contends that it is in compliance with its checklist OSS obligations because its electronic OSS returns a response to competitors within four seconds of the time it provides such responses to itself.[41] Of paramount importance, however, is what DSL loop pre-order information Verizon actually provides to competitors. First, despite Verizon's argument that the Commission should rely on its conclusion in the *Bell Atlantic New York Section 271 Order* that Verizon complied with the then-existing OSS rules, the Commission has adopted new OSS rules since that time, in the *UNE Remand* order. Verizon was not required to comply with that order at the time of its New York application; indeed, even SBC was not yet required to prove *UNE Remand* compliance in its Texas application.[42] Thus, the Commission's conclusion in the *New York Section 271 Order* that Verizon complied with the OSS rules as they then existed is, for purposes of the instant Massachusetts application, irrelevant. Verizon must prove its *UNE Remand* compliance for the first time here; as argued by Covad throughout this proceeding, Verizon has not done so.

In the *UNE Remand Order*, the Commission adopted numerous additional obligations on incumbent LECs to provide access to loop prequalification information. Specifically, the Commission required incumbents, pursuant to section 251(c)(3) of the Act, to provide:

> nondiscriminatory access to the same detailed information about the loop that is available to the incumbent, so that the requesting carrier can make an independent judgment about whether the loop is capable of supporting the advanced services equipment the requesting carrier intends to install. Based on these existing obligations, we conclude that, at a minimum, incumbent LECs must provide requesting carriers the same underlying information that the incumbent LEC has in any of its own databases or other internal records. For example, the incumbent LEC must provide to requesting carriers the following: (1) the composition of the loop material, including, but not limited to, fiber optics, copper; (2) the existence, location and type of any electronic or other equipment on the loop, including but not limited to, digital loop carrier or other remote concentration devices, feeder/distribution interfaces, bridge taps, load coils, pair-gain devices, disturbers in the same or adjacent binder groups; (3) the loop length, including the length

[40] *Id.*
[41] Young Letter at 2.
[42] *SWBT Texas Section 271 Order* at para. 165.

> and location of each type of transmission media; (4) the wire gauge(s) of the loop; and (5) the electrical parameters of the loop, which may determine the suitability of the loop for various technologies.[43]

Verizon does not make the loop qualification information listed above available to Covad in Massachusetts. Verizon has represented to the Commission that "some 93 percent of central offices where CLECs have collocation already were included in the loop qualification database" as of July 2000.[44] Just because such central offices are "included" in the database, the information that Verizon provides through that database is not automatically compliant with the *UNE Remand* order. Indeed, Verizon is not providing the information required by the *UNE Remand* order through these supposedly "included" central office databases.

Covad has presented detailed information to the Common Carrier Bureau[45] demonstrating that Verizon's loop prequalification tool returns to Covad only information on whether the loop in question would be suitable for *Verizon's own retail service.* As such, Verizon's OSS does not provide such information as "the composition of the loop material," "the existence, location and type of any electronic or other equipment on the loop," "the length and location of each type of transmission media," or "the electrical parameters of the loop."[46] Rather than provide any of the detailed loop information that the Commission's rules require, Verizon simply informs Covad whether the loop is qualified or not: a green light or red light. With a red light response comes no information other than "address tested not qualified" -- meaning it wouldn't qualify for Verizon's retail service, or "spectrum management T-1" meaning the loop doesn't qualify pursuant to Verizon's own internal technical specifications.[47] Verizon contends – as it always has – that it need not provide any underlying loop information to competitors because it does not provide such information to its own retail representatives.[48] But this is not the obligation that Verizon must fulfill.

Verizon represents to you that it has "voluntarily offered to provide other carriers with electronic access to back office inventory systems that contain limited additional loop information."[49] That is partially true. Verizon has offered to create a separate database, at a potential cost of millions of dollars, and populate it with some, but not all, of the loop pre-qualification information that Verizon stores electronically. But Covad has asked Verizon to simply provide what the law requires: access to the electronic

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[43] *UNE Remand Order* at para. 427.

[44] Letter dated November 22, 2000, from Dolores A. May, Executive Director, Federal Regulatory, Verizon, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, at 5.

[45] *See, e.g.* Covad Comments (CC Docket No. 00-176) at 39-43); Letter dated October 26, 2000, from Jason Oxman, Senior Government Affairs Counsel, Covad Communications Company, to Magalie Roman Salas, Secretary, FCC (Covad OSS Ex Parte Letter).

[46] *UNE Remand Order* at para. 427.

[47] *See* Covad OSS Ex Parte Letter at 7.

[48] This is the case because Verizon offers a far narrower range of DSL services than do Covad and other competitors. As a result, this information on loop parameters is irrelevant to Verizon's own retail representatives, but of vital importance to competitors seeking to provide a variety of innovative services beyond those limited services provided by the incumbent.

[49] Young Letter at 2.

information that Verizon possesses on its loops. Verizon has chosen to erect roadblocks, first by refusing to provide any information whatsoever, then by proposing construction of a parallel network to provide only some of the information required. As detailed to the Bureau throughout this proceeding,[50] Covad has been seeking access to loop pre-qualification information pursuant to the Commission's rules, and Verizon is denying Covad such access. Because this application marks the first occasion for the Commission to rule on a BOC's compliance with the *UNE Remand* OSS requirements, the Commission must not permit Verizon to so blatantly ignore its obligations to competitive DSL providers.

Verizon is not in compliance with the Commission's linesharing rules in Massachusetts.

Verizon does not mention linesharing compliance in its December 1, 2000, letter to you. In recent weeks, Covad has been able to access concrete information to counter Verizon's representation to the Commission in its Massachusetts application that it is in compliance[51] with the Commission's linesharing rules. On a joint tour with Verizon of several central offices in Massachusetts conducted on November 21, 2000, Covad discovered that Verizon has not yet completed the central office work required to bring it into compliance with the Commission's rules.[52] To cite just a few examples, despite Verizon's representation to the Commission that it had completed all splitter installations in Covad-requested central offices in Massachusetts, splitters in a West Roxbury, Massachusetts, central office that Covad had requested months ago were only installed *on the morning of the scheduled walkthrough* on November 21. In addition, Covad discovered that the splitter installation Verizon claimed was complete in an Acton, Massachusetts central office was only an empty shelf – the splitter cards required for the splitter to work had not yet been installed. In these central offices, dozens of Covad linesharing orders are sitting, unfulfilled, while Verizon refuses to complete the work it must do to provide linesharing UNEs to Covad.

Why is linesharing compliance so important? The Commission has already recognized the huge competitive advantage Verizon derives from providing linesharing capabilities to itself while continuing to deny linesharing to its competitors. In addition, linesharing is a UNE – and Verizon must demonstrate that it is providing nondiscriminatory access to linesharing in order to prove its checklist compliance. As detailed by Covad in its comments in this proceeding, Verizon is providing linesharing capability only to itself, while violating the Commission's June 6, 2000, deadline by refusing to provide linesharing to Covad. At stake is more than section 271 compliance: Covad has announced publically that, beginning January 1, 2001, it will provide residential DSL service almost exclusively over lineshared loops.[53] If Verizon continues to deny Covad access to linesharing capability, residential consumers in Massachusetts

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[50] *See, e.g.*, Covad OSS *Ex Parte* at 3-6.

[51] *See, e.g.* Letter from Dolores A. May, Executive Director, Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 00-176 (Oct. 27, 2000) (stating that Verizon " has prepared 100 percent of the central offices for line sharing").

[52] *See* Letter dated November 28, 2000, from Jason Oxman, Senior Government Affairs Counsel, Covad Communications Company, to Magalie Roman Salas, Secretary, FCC.

[53] Covad's business-class DSL services will be provided over stand-alone loops.

will be denied access to Covad's service as if the Commission had never adopted linesharing rules. More importantly, should the Commission set the bar for linesharing compliance as low as it currently stands in Massachusetts, consumers across the country will be subject to the same lack of choice as section 271 applications subject to this lowered performance bar are presented to the Commission. To put matters in perspective, Verizon has announced publicly that it will have over half a million retail lineshared loops in service by the end of December; at the same time, Verizon has provisioned only a few hundred linesharing UNEs to Covad.

Verizon has refused to provide Covad the carrier-specific data that Covad is entitled to in Massachusetts.

Since at least July 2000, Covad has asked Verizon to provide Covad-specific data for Massachusetts.[54] Verizon has refused. As the Department of Justice concluded in its evaluation of Verizon's application, "Verizon has not provided individual CLECs reports that show its performance on their DSL orders. We are not aware of any reason for this omission, and in fact Verizon provides such individual performance reports in New York."[55]

On November 13, 2000, Verizon finally provided a small amount of Covad-specific data. The date is important not only because it was a week after Verizon submitted such data to the Commission, but also because the information was provided to Covad only *after* the reply comments were due in this docket. In addition, Verizon "corrected" its performance reporting in an *ex parte* letter dated November 14, and rather than send the corrected version directly to Covad's legal counsel in Washington, D.C., Verizon sent the document via regular mail to Covad's Santa Clara, California office, further delaying by a week an opportunity to comment on Verizon's late-filed data. Most important, this Covad-specific data for Massachusetts comes to Covad nearly *four months* after Covad first requested such information from Verizon, a request that Verizon denied outright.

The carrier-specific information that Verizon finally did provide to Covad on November 13, 2000 is not the information to which Covad is entitled. Verizon simply calculated its performance, using certain Massachusetts metrics, as to Covad. Verizon did not, however, provide Covad the underlying data that it used to make those calculations (how many loops Covad ordered, which loops Verizon was excluding for what it claimed were Covad or customer reasons, and similar information). As noted by the Department of Justice, such information is vital for Covad to examine whether Verizon's stated performance is accurate. Yet Verizon has refused, and continues to refuse, to provide the actual data that it uses to calculate its performance.

The Massachusetts DTE has not put in place procedures to adopt modifications to the New York DSL loop measures.

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[54] *See* Attachment A to Covad Reply Comments, CC Docket No. 00-176 (email chain commenced July 21, 2000, between Covad and Verizon).

[55] DOJ Evaluation at 15.

Verizon represents to you in its December 1, 2000, letter that the Massachusetts DTE "has said it will incorporate additional measures adopted there into the Massachusetts Plan."[56] This is not true. In its recent order addressing the Massachusetts Performance Assurance Plan (PAP), the Massachusetts DTE recognized "the Massachusetts PAP should be strengthened with respect to DSL services."[57] But rather than incorporate the New York changes automatically into the Massachusetts PAP, the DTE chose to await what happens in New York and decide at some unspecified point in the future whether to do the same.[58] Thus, the DTE did not, as Verizon represented to you, say that "it will incorporate additional measures" from New York; rather, the DTE said that it would simply wait until New York acted and then decide whether to adopt the same measures in Massachusetts. In particular, the Massachusetts PAP as it currently stands does not include DSL as a "method of entry," and thus denies Covad and other DSL providers the millions of dollars in bill credits that Verizon makes available to other carriers to compensate for its poor performance.[59]

Verizon does not believe it is bound by the nation's antitrust laws if it violates the Telecommunications Act, and thus the Commission's traditional reliance on antitrust remedies in the section 271 arena is inappropriate here.

Finally, it is important to note that the Commission's traditional reliance on the nation's antitrust laws – and, indeed, the Commission's reliance on Verizon's representations that such laws will deter and prevent backsliding by Verizon – has been called into serious question by Verizon itself in a recent court filing.

As detailed in a letter from Covad to FCC General Counsel Christopher Wright on September 15, 2000, Verizon has moved to dismiss Covad's pending antitrust case on the basis of the Seventh Circuit's recent decision in *Goldwasser v. Ameritech Corp.*[60] In *Goldwasser*, the Seventh Circuit held as to the claims before it that conduct by an ILEC constituting, or "inextricably linked,"[61] to the ILEC's violations of its duties under the

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[56] Young Letter at 10.

[57] *See Investigation by the Department of Telecommunications and Energy upon its own motion pursuant to Section 271 of the Telecommunications Act of 1996 into the Compliance Filing of Verizon New England Inc. d/b/a Verizon Massachusetts as part of its application to the Federal Communications Commission for entry into the in-region interLATA (long distance) telephone market, Order on Motions for Clarification and Reconsideration*, DTE 99-217, Nov. 21, 2000, at 6.

[58] *See id* at 7. ("We understand that a decision from the NYPSC about whether to modify the New York PAP to incorporate DSL and line sharing specific performance measures and metrics will be issued next month. Because the Massachusetts PAP is largely based on the New York PAP, it will be helpful to first see what changes are made in New York prior to deciding on the specific changes to be made to the Massachusetts PAP. Thus, we will await NYPSC's decision rather than duplicate New York's investigative efforts on supplementary PAP measures.").

[59] For example, in October 2000, Verizon owed over $2.6 million to CLECs in New York pursuant to that state's PAP. It is truly disturbing that Verizon continues to perform so poorly in New York post-271 entry.

[60] *Goldwasser v. Ameritech Corp.*, No. 9801439, 2000 WL 1022365 (7th Cir. July 25, 2000). Covad is confident that the nation's judiciary will ultimately reject Verizon's position. In the interim, it is clear that Verizon does not view the antitrust laws as a deterrent because it believes that it can persuade the nation's courts that the antitrust laws do not apply to it.

[61] *Id.* at 1022365 * 11.

Act cannot constitute the exclusionary behavior that is necessary to prove a violation of Section 2 of the Sherman Act. Alternatively, the court held that even if the plaintiffs' allegations did constitute Section 2 violations, the existence of an antitrust remedy would conflict with the Act, thus precluding antitrust enforcement in that case.

Although purporting to vindicate the Commission's authority, the Court apparently was unaware of the Commission's view that antitrust enforcement is an important component of the totality of remedies that can be relied on to effectuate the Act.[62] Moreover, when Verizon (then Bell Atlantic) sought section 271 approval late last year in New York, it represented to the Commission that even after obtaining 271 authority it would be adequately motivated to comply with the Act because, among other things, it would remain subject to private remedies under the antitrust laws, including treble-damages.[63] Verizon now seeks dismissal of Covad's antitrust case by asserting the exact opposite. The Commission should be extremely concerned about Verizon's legal position that the nation's antitrust laws simply do not apply to its Telecommunications Act-mandated obligations. Given the Commission's past reliance on these same antitrust laws as protection against Verizon's backsliding, the Commission should be fully aware that Verizon does not believe itself subject to those laws. As such, the Commission should not rely solely on those laws to protect against Verizon's anticompetitive conduct, particularly in the face of such clearly discriminatory treatment of competitors in Massachusetts.

Conclusion: What the Commission should do now.

This application should be decided only on the evidence presented, but that evidence must be viewed through the concrete and definite standards that this Commission has established in prior section 271 applications. Were it to approve this application despite Verizon's poor DSL loop, OSS and linesharing performance, the Commission would "lower the bar" for acceptable DSL performance in future applications. I know you are aware, Mr. Chairman, that the DSL sector – the exemplar of local facilities-based competition – simply cannot survive any more regulatory impediments.[64] Covad respectfully suggests that a Commission decision to reward Verizon for its regulatory maneuvering will continue to make the section 271 process a nightmare for Commission staff and a mockery of the statutory process that the Commission has fought so hard to preserve. Mr. Chairman, the legacy of this Commission must not be the death of the hopes of consumers for truly effective competition among DSL carriers.

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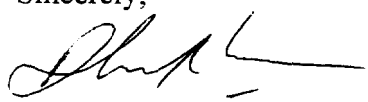
[62] *Bell Atlantic New York 271 Order* at para. 430 ("Furthermore, Bell Atlantic risks liability through antitrust and other private causes of action if it performs in an unlawfully discriminatory manner.").
[63] *Id.* at 430 n. 1320.
[64] *See*, .e.g. "NorthPoint's Stock Plunges After Verizon Nixes Deal," Reuters, Nov. 30, 2000, *quoting* Michael Bowen, analyst, Deutsche Banc Alex Brown ("It's terribly unfortunate that the regulatory environment is not helping. Regulators have not been vigilant enough to enforce RBOCs to compete on a level playing field. Is this the death [of] broadband in local markets? I don't think we're seeing the death of it, but the RBOCs will be the only ones providing it and they will be slow in rolling it out...it's unfortunate.").

The Commission must take a firm and definitive stand in favor of competition: spell out clearly for Verizon that it must fix its loop provisioning problems (all of them, not just those that will clean up their metrics), and that it must not come back with a new application until all those problems are fixed. Verizon must be in full compliance with its linesharing and OSS obligations *before* it comes to the Commission with another section 271 application. That is, after all, what the section 271 process is supposed to be all about.

Sincerely,



Dhruv Khanna
Executive Vice President
And General Counsel

cc: Kathryn Brown
Commissioner Michael Powell
Commissioner Susan Ness
Commissioner Gloria Tristani
Commissioner Furchtgott-Roth
Anna Gomez
Kyle Dixon
Jordan Goldstein
Deena Shetler
Rebecca Beynon
Dorothy Attwood
Glenn Reynolds
Jared Carlson
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